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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918.

No. [redacted]79

JENNIE McCARTY MacMATH, ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF THOMAS MacMATH, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER [redacted], 1918.

(24,639)

(25,629)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 799.

JENNIE McCARTY MacMATH, ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF THOMAS MacMATH, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 12, 1917.

1 In the Court of Claims.

No. 33060.

JENNIE MCCARTY MACMATH, Administratrix of the Goods, Chattels, and Credits Which Were of Thomas MacMath, Deceased.

vs.

THE UNITED STATES.

I. *Petitions and Amendment to Petition.*

On May 10, 1915 the claimant filed her original petition. Subsequently, to wit, November 11, 1915, the claimant, by leave of Court, filed an amendment to said petition so that it now reads as follows:

Petition.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully represents and shows:

I. Claimant is the widow of Thomas MacMath who died October 8th, 1913, and who was a citizen of the United States and a resident of the State of New York at the time of his death.

II. Claimant was duly appointed administratrix of the Goods, Chattels and Credits which were of the said Thomas MacMath, deceased, by the Surrogate's Court of the County of Kings, State of New York, a court of competent jurisdiction, on the 6th day of January, nineteen hundred and fifteen, and letters of administration were duly issued to claimant out of said court on said date.

III. Claimant's intestate was an employee in the Customs Service of the United States at the Port of New York and held the following positions:

He was appointed "assistant weigher of customs" August 1st, 1896, at a salary of $3.00 per diem "when employed."

He was appointed "assistant weigher of customs" July 27th, 1901, at a salary of $4.00 per diem "when employed."

2 On July 1st, 1908, his designation as "assistant weigher of customs" at $4.00 per diem when employed, was changed so that his compensation was fixed at $4.00 per diem throughout the year.

He was appointed to the offices of "clerk" and "acting United States weigher of customs" on May 12th, 1909, and was paid a compensation of sixteen hundred ($1,600) dollars per annum.

He was appointed to the offices of "clerk" and acting United States weigher of customs" on August 18th, 1911, and was paid a compensation of eighteen hundred ($1,800) dollars per annum.

His services beginning August 1st, 1896, and continuing to the

date of his death, as hereinbefore alleged on October 8th, 1913, was continuous and uninterrupted.

The appointments in this petition described were made by the Collector with the approval of the Secretary of the Treasury in accordance with sections 2621 and 2634, Rev. Stat. For many years the number of U. S. weighers appointed and rendering service at the port of New York has fluctuated. In 1876 there were nineteen weighers; in 1900 there were seven weighers, and from 1904 to 1909 there were five weighers.

There has been no statute limiting the number of weighers at that port.

For a number of years prior to May 12, 1909, the port of New York was divided into five weighing districts, with a weigher in charge of each district, and from two to five clerks were
3 assigned to each district to verify dock books and to perform clerical duties. The clerks and laborers were all under the authority of the weigher in charge of a given district, and the weighers were under the immediate direction of a deputy surveyor. May 12, 1909, Mr. William Loeb, Collector of the port of New York, made a reorganization, dividing the port into eight weighing districts, dismissing four of the five weighers then in the service there and retaining one; and he appointed, with the approval of the Secretary of the Treasury, ten "acting weighers" for service at that port, Thomas MacMath being one of them. Eight of the ten "acting weighers" were assigned to the various districts and two were assigned to duty at the Custom House, where they were given charge of referred returns, compaints, protests of weights, etc., but at times these two "acting weighers" were also assigned to districts. All the "acting weighers" performed the duties of weigher including supervisory duties, the taking of weights, testing of implements and caring for and safeguarding them. The assistant weighers reported their findings of weights to the "acting weighers," and on the
4 requisitions of the latter necessary repairs to weighing implements were made and additional weighing implements and supplies were procured. These "acting weighers" were required to wear the prescribed uniform of a weigher. They were required to furnish efficiency ratings of the assistant weighers and laborers serving under them, and to supervise and instruct the assistant weighers. The "acting weighers" were given authority and control over the laborers in their respective districts, and generally they performed the duties of clerks and weighers.

The conditions above described continued until the end of the service rendered by Thomas MacMath.

IV. Claimant's intestate was during all the times hereinbefore and hereinafter mentioned, an employe of the Civil Service of the United States under the Act of Congress of January 16th, 1883, known as the Civil Service Law.

V. The Act of Congress of July 26th, 1866 (14 Stat., 289), Chapter 239, Section 3, fixes the salary of "weighers of customs at the Port of New York" at twenty-five hundred ($2,500) dollars per annum. Congress has not by any subsequent legislation changed the

salary of the office of "weigher of customs" at the Port of New York, and claimant avers that the salary of the office of "weigher of customs" at the Port of New York at the present time is twenty-five hundred ($2,500) dollars per annum.

VI. Claimant's intestate was duly appointed to the offices of "clerk" and "acting United States weigher of customs" on May 12th, 1909, but was only paid the salary of a "clerk" at sixteen hundred ($1,600) dollars per annum, therefor, although he duly performed the duties incident to each said office, claimant's intestate was duly appointed to similar offices as "clerk" and "acting United States weigher of customs" on August 18th, 1911, but was only paid the salary of a "clerk" at eighteen hundred ($1,800) dollars per annum therefor, although he duly performed the duties incident to each said office. He was paid this latter amount until his death on October 8th, 1913, as hereinbefore alleged.

VII. During the period from May 12th, 1909, to October 7th, 1913, claimant's intestate performed the duties attached to the office of "United States weigher of customs," but did not receive the salary for said office as fixed by law, nor any part thereof.

VIII. Claimant avers that there is no statutory authority for the creation of the office of "acting United States weigher of customs," and that the creation, or the attempted creation, of said office was a manifest effort to evade the provisions of the act of July 26th, 1866 (supra).

Claimant further avers that claimant's intestate was entitled to the salary of the office of "United States weigher of customs" at twenty-five hundred ($2,500) dollars per annum on and after May 12th, 1909, to and including October 7th, 1913, the whole amounting to eleven thousand thirteen dollars and eighty-nine cents ($11,013.89).

IX. Claimant, by her attorneys, on February 3rd, 1915, filed this account with the Auditor of the Treasury Department. The Auditor disallowed the account on February 18th, 1915, and an appeal was thereupon taken to the Comptroller of the Treasury for a revision thereof on March 18th, 1915. The Comptroller, on March 26th, 1915, affirmed the action of the Auditor and directed that a certificate of no difference be issued.

X. Claimant is the sole owner of this claim as the duly appointed administratrix of the Goods, Chattels and Credits which were of the said Thomas MacMath, deceased; no other person or corporation is interested therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made.

XI. Claimant is justly entitled to the amount herein named from the United States, as she is advised and believes, after allowing all just credits and set-offs.

Wherefore she prays judgment against the United States for the sum of eleven thousand thirteen dollars and eighty-nine cents ($11,013.89).

SPOOR & RUSSELL,
Attorneys of Record.

6 STATE OF NEW YORK,
County of New York:

Personally appeared before me, a notary public, in and for the county of New York, William E. Russell, who being sworn according to law, deposes and says, that he is a member of the partnership of Spoor & Russell, which partnership has been duly authorized by power of attorney to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing petition, and that the matters and things therein stated are true in substance and in fact as he is informed and believes.

Subscribed and sworn to before me this 3rd day of May, A. D. 1915.

ALBERT HLAVAC, Jr.,
Notary Public, New York County,
County Clerk's No. 1698.

7 II. *History of Proceedings.*

On September 8, 1915 the defendants filed a general demurrer to the petition.

On November 11, 1915 the demurrer was argued and it was thereupon ordered that claimant be granted leave to amend her petition.

On November 11, 1915 an amendment to the petition was filed, as set forth in the petition heretofore mentioned.

On November 22, 1915 the demurrer was overruled.

III. *Argument and Submission of Case.*

On April 13, 1916 the case was argued by Mr. W. E. Russell, for the claimant, and Mr. W. F. Norris, for defendants, and submitted.

8 IV. *Findings of Fact and Conclusion of Law and Opinion of the Court.*

Filed May 29, 1916.

Opinion as Amended Oct. 16, 1916.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant, Jennie McCarty MacMath, is the duly appointed administratrix of Thomas MacMath, deceased. He was a citizen of the United States and a resident of the State of New York at the time of his death, which occurred on the 8th day of October, 1913.

II.

Claimant's intestate, the said Thomas MacMath, held the following positions in the customs service of the United States at the port of New York. He was appointed "assistant weigher of customs" August 1, 1896, at a salary of $3 per diem "when employed"; he was appointed "assistant weigher of customs" July 27, 1901, at a salary of $4 per diem "when employed." On July 1, 1908, his designation as "assistant weigher of customs" at $4 per diem "when employed" was changed so that his compensation was fixed at $4 per diem throughout the year. On May 12, 1909, he was appointed as "clerk, class 3, new office, to act as acting U. S. weigher," with compensation at the rate of $1,600 per annum. This last appointment resulted from a reorganization recommended by the collector of the port and approved by the Secretary of the Treasury, whereby 4 of the 5 positions of United States weigher at a compensation of $2,500 per annum each were abolished and 10 assistant weighers at a compensation of $4 per diem each were made "clerks of class 3, to act as acting United States weigher of customs," at a compensation of $1,600 per annum each. The said Thomas MacMath was one of the assistant weighers so advanced. When he received the last-named appointment the said Thomas MacMath took and subscribed to the oath of office, wherein it was recited that he had been "appointed clerk and acting U. S. weigher, class 3, collector's office, port and district of New York"; and upon or attached to the form containing the oath subscribed to was the following agreement, duly signed by the said MacMath:

"I hereby covenant and agree to and with the United States that I shall not make claim to any compensation as acting weigher, but that my compensation as clerk, class 3, shall be the limit of any claim that I may have for services rendered while in the employ of the United States under my present appointment."

He entered upon the discharge of his office, and on August 18, 1911, he was again appointed as clerk, class 4, to act as acting United States weigher of customs, at a compensation of $1,800 per annum. He took and subscribed to the same oath of office and signed an agreement in all things similar to the one above quoted. He was carried on the pay rolls as clerk. When acting weigher he performed duties theretofore performed by a weigher. Acting United States weighers were also authorized to take acknowledgments of employees on pay rolls, a duty which devolved upon clerks alone.

9

III.

The said Thomas MacMath continued in the said service until the date of his death, and during the entire period of his employment he was paid the said compensation fixed by the collector. At no time did he ever claim any additional compensation than that fixed as stated above, and he accepted the payments without protest or objection.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and her petition is therefore dismissed.

Opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

Thomas MacMath was at the time of his death an employee in the customs service at the port of New York. His administratrix brings this action.

Plaintiff's intestate was appointed "assistant weigher of customs" on August 1, 1896, at a salary of $3 per diem "when employed," and he was appointed "assistant weigher of customs" on July 27, 1901, at a salary of $4 per diem "when employed."

On July 1, 1908, his designation of "assistant weigher of customs" at $4 per diem "when employed" was changed so that his compensation was $4 per diem throughout the year.

On May 12, 1909, plaintiff's intestate was appointed "clerk, class 3, new office, to act as acting United States weigher," with compensation at the rate of $1,600 per annum. The last-named appointment resulted from a reorganization recommended by the collector of the port whereby four out of five positions of United States weigher at compensation at $2,500 per annum each were abolished, and ten "assistant weighers," whose compensation was $4 per diem each, were appointed, each "clerk, class 3, new office, to act as United States weigher" at the compensation of $1,600 per annum. Thomas MacMath was one of those so appointed. When appointed said MacMath executed his oath of office "as clerk and acting U. S. weigher, class 3, collector's office, port and district of New York," on May 12, 1909. At the same time he signed an agreement as follows:

"I hereby covenant and agree to and with the United States that I shall not make claim to any compensation as acting weigher, but that my compensation as clerk, class 3, shall be the limit of any claim that I may have for services rendered while in the employ of the United States under my present appointment."

He was similarly appointed on August 16, 1911, at the salary of $1,800 per annum, and again signed an agreement like the one above quoted. He never made or filed any protest against the said action; he was regularly paid and accepted the payment of $1,600 per annum and $1,800 per annum while in office and never made any demand for other or additional compensation.

1. The plaintiff claims that her intestate was appointed to two offices, one that of "clerk" and the other that of "weigher," and that she is entitled to recover the salary of weigher at $2,500 per anum from May 12, 1909, until his death in October, 1913, in addition to the compensation that was paid him.

In no event can recovery be had of the salaries of the two offices if it be assumed that he was appointed to two offices. The salary

fixed by the statute, act of July 26, 1866, 14 Stats., 289, for "weighers at the port of New York" is $2,500 per annum. By an act approved July 31, 1894, 28 Stats., 205, it is provided that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached, unless specially heretofore or hereafter specially authorized thereto by law." Without considering the effect of sections 1764 and 1765, Revised Statutes, in this connection it is manifest that plaintiff's intestate could not lawfully have been appointed to said two offices or be paid the salary attached to both because of the prohibition contained in said act of July 31, 1894. Pack's case, 41 C. Cls., 414; United States v. Harsha, 172 U. S., 567, 572.

2. The plaintiff claims, however, that the appointment of her intestate was to the office of weigher; that he took up the duties of weigher and continued to discharge them. Admitting in argument that the Secretary of the Treasury had authority to create as many weighers as the service might require and that the power to create these positions carries with it the power to abolish them, it is contended for plaintiff that when the Secretary created ten new positions of "acting United States weighers," his act in law must be regarded as creating ten new positions of United States weighers." It is also insisted that the plan of reorganization recommended by the collector of the port and approved by the Secretary of the Treasury was a subterfuge to evade the salary provision applicable to the office of weigher. We do not agree with either of these contentions. They are not sustained by the facts or the law.

It is well established that where an act of Congress declares that an officer shall receive a certain compensation for his services that compensation can neither be enlarged nor diminished by any regulation or order of the President or of a department, unless the power to do so is given by an act of Congress. Glavey case, 182 U. S., 595; Adams case, 20 C. Cls., 115; Jacobs case, 41 C. Cls., 452.

But the principle so announced does not aid the plaintiff. No reduction was made or attempted to be made in the salary of the office to which plaintiff's intestate was appointed. He was not appointed United States weigher, did not take oath of office as such, and he was paid the salary attached to the office which he accepted.

The statute authorized the appointment of weighers without designating their numbers. Revised Statutes, section 2621. The salary of weighers at the port of New York was fixed by statute at $2,500. Section 2634, Revised Statutes, authorizes the Secretary to limit and fix, except in cases otherwise provided, the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor.

There were five "weighers" and ten or more "assistant weighers of customs" at said port. The plan of reorganization of the force abolished four of the offices of weigher and changed the designation of "assistant weigher of customs," creating the office of "clerk," class 3, new office, to act as acting U. S. weigher" and to these latter

positions ten persons, including plaintiff's intestate, were appointed. His oath of office subscribed by said intestate in August, 1911, recited that he had been "appointed clerk and acting U. S. weigher, class 4, collector's office, port and district of New York." He subscribed a similar oath when appointed on May 12, 1909, in class 3. At the time of taking the oath of office he executed the agreement above set forth. The claim which said agreement purports to waive is any claim to compensation as "acting weigher."

The Secretary was authorized to appoint weighers and to appoint clerks. To one office a statutory salary was attached and to the other the salary could be fixed by the Secretary. He could not lawfully appoint one person clerk and weigher, because the salary of the weigher was $2,500. Act of July 31, 1894, supra. It is not to be presumed that he intended to do an unlawful act or that plaintiff's intestate in accepting the appointment participated in an unlawful act. He was certainly appointed clerk, which was an office duly authorized. Neither party thought the appointment was that of weigher.

11 We should construe the act of appointment in such manner as to give it validity instead of invalidity when that course can be adopted. If appointed clerk and weigher the appointment was not lawful. When appointed "clerk, class 3, new office, to act as acting weigher," he was appointed clerk, which was a lawful appointment. The assignment of his duties as clerk were within the Secretary's power, and the agreement made at the time of his appointment leaves no doubt that plaintiff's intestate knew that his office was that of clerk and he accordingly agreed that he would not seek any compensation "as acting weigher" and that his "compensation as clerk, class 3," would be the limit of any claim he had for services. The plaintiff's intestate never sought any other compensation. The facts do not bring the plaintiff's case within the rule stated in Adam's case, 20 C. Cls., 115, Glavey case, 182 U. S., 595, Rush case, 35 C. Cls., 223, Whiting case, 35 C. Cls., 291, and Jacob's case, 41 C. Cls., 452. He was not entitled to the salary of weigher. Upon the right of the administratrix to maintain the action, the rule announced in Garlinger's case (169 U. S., 316), should, under the facts developed, be applied if the case turned upon that point alone.

The petition should be dismissed, and it is so ordered.

All of the judges concur.

V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 29th day of May, 1916, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the claimant, Jennie McCarty MacMath, administratrix of the estate of Thomas MacMath, deceased, as aforesaid, is not entitled to recover and shall not recover any sum in this action from the defendants, the United States; and, that the petition in this cause be dismissed.

BY THE COURT.

12 VI. *History of Further Proceedings.*

On June 26, 1916 the claimant filed a motion to amend findings and opinion, which motion was overruled by the Court on October 16, 1916 as to the findings, but the opinion was amended as heretofore mentioned in this record.

VII. *Application of Claimant for, and Allowances of, Appeal to the Supreme Court of the United States.*

The claimant makes application for an appeal to the Supreme Court of the United States in the above entitled case.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

Filed October 24, 1916.

Ordered: That the above appeal be allowed as prayed for.
Oct. 24, 1916.

BY THE COURT.

13 In the Court of Claims.

No. 33060.

JENNIE MCCARTY MACMATH, Administratrix of the Goods, Chattels, and Credits Which Were of Thomas MacMath, Deceased,

vs.

THE UNITED STATES.

I, Samuel A. Putman, Chief Clerk Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact, conclusion of law and opinion of the Court; of the judgment of the Court; of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this 25th day of October, A. D., 1916.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 25,629. Court of Claims. Term No. 799. Jennie McCarty MacMath, administratrix of the goods, chattels and credits, which where of Thomas MacMath, deceased, appellant, vs. The United States. Filed November 29th, 1916. File No. 25,629.

Subject Index.

LIST OF CASES CITED:

LIST OF STATUTES CITED:

Supreme Court of the United States

October Term, 1917.

JENNIE MCCARTHY MACMATH, Administratrix of the Goods, Chattels and Credits which were of Thomas MacMath, deceased, Appellant, against THE UNITED STATES.	No. 332.

APPELLANT'S BRIEF.

Statement of the Case.

I.

This case comes here on appeal from the Court of Claims, where it is reported in 51 C. Cls. 356. The case involves the question as to whether appellant's intestate held two offices in the customs service, and if so, whether or not he was entitled to the salary of each. A further question is involved if the court should decide that appellant's intestate did not hold two offices. In the latter event, the question is presented for consideration as to whether appellant's intestate received during his lifetime all of the salary due him pursuant to law under his appointment.

II.

The appellant is the widow and duly appointed administratrix of Thomas MacMath, who died October 8th, 1913, and who was a citizen of the United States and a resident of the State of New York at the time of his death (R. 4).

III.

Thomas MacMath was first appointed in the customs service as "assistant weigher of customs" on August 1, 1896, at a salary of $3.00 per diem "when employed." He was promoted as such "assistant weigher of customs" on July 27, 1901, to the salary of $4.00 per diem "when employed." On July 1, 1908, his designation as "assistant weigher of customs" at $4.00 per diem "when employed" was changed so that his compensation was fixed at $4.00 per diem throughout the year. On May 12, 1909, he received a further promotion and was appointed as "clerk, class 3, new office, to act as acting U. S. weigher" with compensation at the rate of $1,600 per annum. He was further promoted on August 18, 1911, as "clerk, class 4, to act as acting U. S. weigher" at $1,800 per annum. He continued to receive said compensation until the date of his death (R. 5).

IV.

When MacMath was promoted to $1,600 per annum on May 12, 1909, he was required to, and did sign the following agreement:

> "I hereby covenant and agree to and with the United States that I shall not make any claim to any compensation as acting weigher, but that my compensation as clerk, class 3,

> shall be the limit of any claim that I may have for services rendered while in the employ of the United States under my present appointment" (R. 5).

MacMath received this appointment as a result of a reorganization of the port of New York, recommended by the collector of customs and approved by the Secretary of the Treasury, whereby four of the five positions of U. S. weigher, at a compensation of $2,500 per annum each, were abolished and ten assistant weighers, at a compensation of $4.00 per diem each, were made "clerk, class 3, to act as acting U. S. weigher of customs," MacMath being one of the assistant weighers so advanced. MacMath took an oath of office reciting that he had been "appointed clerk and acting U. S. weigher, class 3, collector's office, port and district of New York" (R. 5).

V.

Upon MacMath's promotion to $1,800 per annum on August 18, 1911, he took and subscribed the same oath of office and signed an agreement in all things similar to the one above quoted. He continued to receive the $1,800 per annum until his death (R. 5).

VI.

MacMath was carried on the pay rolls as clerk but when acting weigher he performed duties theretofore performed by a weigher. Acting weighers were authorized to take acknowledgments of employees on pay rolls, a duty which devolved upon clerks alone (R. 5).

VII.

MacMath never claimed any compensation other than that received by him and he accepted said compensation without protest or objection.

Additional Statement of Facts.

I.

The foregoing statement of this case is taken from the findings (R. 4, 5). Appellant, not being satisfied with the findings moved to amend them in the court below, but the motion was overruled.

When appellant filed her petition on May 10, 1915, the defense interposed a general demurrer and filed same on September 8, 1915. The demurrer was argued on November 11, 1915, and upon the argument the court below ordered that claimant be granted leave to amend her petition, and the amendment was filed pursuant to the direction of the court on the said 11th day of November, 1915. The demurrer was overruled on November 22, 1915 (R. 4). This amendment directed by the court below is incorporated in the amended petition (R. 2). The amendment is as follows:

> "The appointments in this petition described were made by the Collector with the approval of the Secretary of the Treasury in accordance with Secs. 2621, 2634, Revised Statutes.
>
> "For many years the number of U. S. weighers appointed and rendering service at the port of New York has fluctuated. In 1876 there were nineteen weighers; in 1900 there were seven weighers, and from 1904 to 1909 there were five weighers.
>
> "There has been no statute limiting the number of weighers at that port.

"For a number of years prior to May 12, 1909, the port of New York was divided into five weighing districts, with a weigher in charge of each district, and from two to five clerks were assigned to each district to verify dock books and to perform clerical duties. The clerks and laborers were all under the authority of the weigher in charge of a given district, and the weighers were under the immediate direction of a deputy surveyor. May 12, 1909, Mr. William Loeb, collector of the port of New York, made a reorganization dividing the port into eight weighing districts, dismissing four of the five weighers then in the service there and retaining one; and he appointed with the approval of the Secretary of the Treasury, ten 'acting weighers' for service at that port, Thomas MacMath being one of them. Eight of the ten 'acting weighers' were assigned to the various districts and two were assigned to duty at the Customs House, where they were given charge of referred returns, complaints, protests of weights, etc., but at times these two 'acting weighers' were also assigned to districts. All the 'acting weighers' performed the duties of weigher, including supervisory duties, the taking of weights, testing of implements and caring for and safeguarding them. The assistant weighers reported their findings of weights to the 'acting weighers,' and on the requisitions of the latter necessary repairs to weighing implements were made and additional weighing implements and supplies were procured. These 'acting weighers' were required to wear the prescribed uniform of a weigher. They were required to furnish efficiency ratings of the assistant weighers and laborers serving under them, and to supervise and instruct the assistant weighers. The 'acting weighers' were given authority and control over the laborers in their respective districts, and generally they performed the duties of clerks and weighers.

> "The conditions above described continued until the end of the service rendered by Thomas MacMath."

The court below, as heretofore stated, required the amendment to be made, and its averments were established by official reports made to the court and not contradicted.

> (See appellant's motion to remand the record, which motion was denied by this court without prejudice, June 4, 1917.)

But the court below did not include such facts in its findings, and so claimant filed a motion to amend the findings in which was copied the exact language of the amendment above quoted. The court below overruled this motion as heretofore stated (R. 9).

We state, professionally, that its averments were clearly proven, just as they are set forth in the amendment filed in the court below, no contradiction thereof being made, and so we feel justified in the inclusion of those facts in our statement of the case.

After the case reached this court appellant moved herein to remand the record to the court below with instructions to find and certify the facts bearing upon the following points:

I.

> "Whether Thomas MacMath performed all the duties attached by law and regulation to the office of U. S. weigher during the entire period covered by this action."

II.

> "Whether, although acting U. S. weighers were carried on the pay rolls as clerks from May 12, 1909, they were spoken of and generally recognized as acting U. S. weighers."

This court, on June 4, 1917, as previously stated,

denied the motion without prejudice, and so we feel that we may, with propriety at this time, ask attention to the averments contained in that motion and to the statements made by the Solicitor General in his brief in opposition thereto.

The motion (pp. 2-5) contains a copy of the essential part of the departmental report made to the Court of Claims, and the motion also contains (p. 5), that part of the motion made by appellant in the court below to amend the findings as follows:

> "(e) Claimant's intestate performed the duties attached by law and regulation to the office of U. S. weigher during all the time covered by this action. Although acting U. S. weighers were carried on the pay rolls as clerks they were spoken of and generally recognized and addressed as acting U. S. weighers."

The language above quoted contained in our motion in the court below was based upon that part of the departmental report submitted by the surveyor of customs at New York, and reading as follows:

> "Although the acting U. S. weighers are carried on the pay rolls as clerks, they are spoken of generally and recognized and addressed as acting U. S. weighers, and the duties they perform are those prescribed by statute and regulation for U. S. weigher."

The Solicitor General, in his brief (pp. 3, 4, 6), contended that the Court of Claims found that decedent performed all the duties of U. S. weigher during the period covered by the action; that he performed the duties of weigher of customs under the two appointments; and that all of the material facts requested by appellant to be certified by the Court of Claims are a part of the record.

We again respectfully submit that the findings do not clearly and affirmatively show whether or not de-

cedent performed the duties attached by law and regulation to the office of U. S. weigher during the period covered by this action, nor do they show whether or not acting weighers were spoken of generally and recognized and addressed as acting U. S. weighers.

Our argument on these points is to be found in our brief in support of the motion to remand (pp. 7-10), and therefore we submit that the findings are so incomplete and inclusive as to make it impossible to decide the case without grave risk of doing wrong to appellant or serious injustice to the United States,

Ripley vs. U. S., 220 U. S. 491,

unless the court will consider as aiding the record, the statements above alluded to and made by the Solicitor General in his brief in opposition to the motion to remand. It may be that those statements should be considered as admissions of fact in aid of the record and in furtherance of justice, so that counsel and the court will be justified in dealing with the case as if the findings had clearly and distinctly stated that the decedent performed all of the duties prescribed by law and regulation for U. S. weighers during the period covered by this action, and that acting U. S. weighers, while carried on the pay rolls as clerks, were spoken of, generally recognized and addressed as acting U. S. weighers.

Therefore we shall now discuss the law questions as if those facts had been affirmatively and clearly set forth in the findings of fact.

The Record Below.

The petition was filed in the court below on May 10, 1915 (R. 1). General demurrer was filed September 8, 1915 (R. 4). The demurrer was argued on November 11, 1915, and it was ordered that claimant

be granted leave to amend her petition (R. 4). An amendment to the petition was filed November 11, 1915 (R. 4). On November 22, 1915, the demurrer was overruled (R. 4). The case was argued on April 13, 1916, and submitted (R. 4). Findings of fact and conclusions of law and opinion of the court were filed May 29, 1916 (R. 4). Petition was dismissed on May 29, 1916 (R. 8). On June 26, 1916, claimant filed motion to amend findings and opinion (R. 9). On October 16, 1916, motion to amend findings was overruled, but opinion was amended (R. 9). Amended opinion filed October 16, 1916 (R. 4). Application for appeal was made and allowed October 24, 1916 (R. 9).

Assignment of Errors.

The court below erred:

1. In dismissing the petition.

2. In not rendering judgment for the petitioner in either the sum of $11,013.89 or the sum of $3,535.27.

Brief of Argument.

I.

The administratrix has the right to bring this action.

Where an employee of the United States dies in office and it subsequently appears that he did not receive all of the salary attached thereto, his legal representatives may bring an action to recover the unpaid amount.

Appellant assumed that there was no question about her right to maintain this action, but a statement appears in the opinion of the court below (R. 8), that seems to raise some question as to this right. The court below stated as follows:

> "Upon the right of the administratrix to maintain the action, the rule announced in Garlinger's case, 169 U. S. 316, should, under the facts developed, be applied if the case turned upon that point alone."

An examination of the Garlinger case does not seem to lay down the rule that the court below refers to.

Appellant submits that she unquestionably has the right to bring this action.

James vs. U. S., 202 U. S. 401.

In the James case it appeared that Mr. Justice James retired from the bench of the Supreme Court of the District of Columbia during the year 1894, and was paid a salary of $4,000 per annum during the period of his retirement. As a matter of fact, the salary of his office, under the law, was $5,000 per annum. After his death his widow, as administratrix, brought an action to recover the additional $1,000 due him. This court gave her judgment for the amount sued for.

II.

The right to hold two offices and to receive the salary of each.

An employee of the United States is not prohibited from holding two offices not incompatible in interest, nor from receiving the salary attached to each.

Thomas MacMath entered the customs service in 1896, on a $3.00 per diem basis "when employed" as "assistant weigher of customs." He received a promotion of $4.00 per diem "when employed" as such "assistant weigher of customs" in 1901. In 1908 his designation was changed so that he received $4.00 per diem for every day in the year, Sundays included, without regard to whether he worked or not on said Sundays. In other words, he was given a definite yearly salary but was paid upon a per diem basis. As such "assistant weigher of customs" he was under the Classified Civil Service. On May 12, 1909, MacMath was selected, together with some nine other assistant weighers, for promotion to a supervisory position, he having theretofore been employed in a subordinate position. He was appointed on that date as "clerk, class 3, new office, to act as acting U. S. weigher of customs." There is no such office as acting U. S. weigher of customs provided for by act of Congress. There is, however, an office known as U. S. weigher, to which a salary of $2,500 per annum is attached. The act follows:

> Act of July 26, 1866, c. 269, sec. 3 (14 stats. 289):
>
> "That the weighers at the port of New York shall receive, from and after the passage of this act, an annual salary of two thousand, five hundred dollars—Provided, that the increase of compensation, over and above the present salary of said officers, shall not exceed, in any fiscal year, the amount of fees earned by them."

The duties of U. S. weighers are prescribed by statutes and regulations.

R. S. 2890:

> "The weighers, gaugers and measurers, employed in the service of the revenue, shall,

within three days after any vessel is discharged, make returns of the articles by them respectively weighed, gauged or measured, out of such vessel. Such return shall be made by the weighers, gaugers and measurers, in books to be prepared by them for that purpose, and kept in the custom houses."

R. S. 2915:

"The Secretary of the Treasury shall, by regulation, prescribe and require that samples from packages of sugar shall be taken by the proper officers, in such manner as to ascertain the true quality of such sugar; and the weights of sugar imported in casks or boxes shall be marked distinctly by the custom house weigher, by scoring the figures indelibly on each package."

R. S. 3024:

"Upon all weighable articles hereafter exported, upon which a drawback or return duty is allowed, and upon all weighable merchandise withdrawn from bonded warehouses for export, there shall be collected by the collectors of the several ports three cents per hundred pounds, to be determined by the returns of the weighers."

Customs Laws and Regulations of 1908, Arts. 1478-1494.

The foregoing articles, Nos. 1478-1494, are set forth in full in the appendix to this argument.

An examination of the aforesaid sections of the Revised Statutes and Articles of the Customs Laws and Regulations of 1908 shows that a weigher is required to perform difficult and highly responsible functions, far beyond the mere bounds of clerical duties. Such important duties as are required of weighers by the aforesaid regulations could not reasonably be expected of mere clerks. It is apparent therefrom that

weighers are distinctly supervisory officers and that they are chargeable by law with responsibility for the correct weights and returns thereof of imported merchandise subject to duty. Furthermore, these weighers are held responsible for the testing of weighing implements and for the preparation and safe-guarding of dock books containing weights, returns made therefrom, and for keeping account of the time of the assistant weighers and laborers under their supervision. It was never contemplated either by statute or regulations that these responsible duties be performed by a clerk.

MacMath's appointment, as heretofore stated, on May 12, 1909, seems to appellant to result in his appointment to two offices, viz: to that of clerk and to that of weigher, and so this action was brought for the salary of a weigher, it being alleged in the petition that MacMath had received only the salary of a clerk and had received no part of the salary of a weigher.

When the evidence had been taken in the court below it appeared that MacMath's principal duties were those prescribed by law and regulation for the office of U. S. weigher. It is true that he performed certain clerical services that had theretofore been performed by clerks detailed for clerical service in the various districts prior to the reorganization of 1909, but most of the clerical duties performed by him were those incident to the performance of his duties as weigher. The record shows (R. 5) that he took acknowledgements of employees on pay rolls as the only distinct clerical service performed by him, it appearing that only clerks were empowered to take such acknowledgements.

Upon the argument of this case in the court below, counsel for the defendant called the court's attention to the following act:

> "Act of July 31, 1894, c. 174, Sec. 2 (28 stats. 205) the same being a part of the Legislative, Executive and Judicial Appropriation Act for the fiscal year eighteen hundred and ninety-five."
>
> "No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand, five hundred dollars, shall be appointed to or hold any other office to which compensation is attached, unless specially heretofore or hereafter specially authorized thereto by law," etc.

After examination of the foregoing statute, counsel for the appellant conceded that such statute might possibly bar MacMath's right to hold both the offices of clerk and of weigher at the same time, and submitted a memorandum to the court, showing the balance due appellant of $3,535.27, should the court decide that the said act prevented the dual holding. This balance was arrived at by deducting the annual sums paid MacMath during the period covered by the action from the sums of $2,500, which was the statutory salary of the office of U. S. weigher.

We frankly state to this court that we are in doubt as to the proper interpretation of this Act of 1894. Apparently the same was intended to amend Section 1763 of the Revised Statutes, which is as follows:

> "No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand, five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law."

This court has construed R. S. 1763 as not precluding the holding of two separate and distinct offices, even though one of them has a salary attached of $2,500 per annum.

Converse vs. U. S., 21 How. 463.

U. S. vs. Saunders, 120 U. S. 126.
U. S. vs. McCandless, 147 U. S. 692.

The court will notice the similarity of language used in R. S. 1763 and the Act of 1894. It may be inferred that Congress intended by the latter act to prohibit the holding of two offices in those cases where the salary of one amounted to the sum of $2,500 per annum. If this court should so decide, manifestly MacMath could not have been appointed to two separate offices. We beg leave, however, to submit this Act of 1894 to this court for the proper construction thereof. Taking the language used therein literally, the statute would not seem to bar the holding of two offices to each of which was attached a salary of $2,400 per annum. That it was not intended by this act to prevent the holding of offices, the aggregate salaries of which amounted to $2,500, or over, is borne out by reference to the case of

Evans vs. U. S., 226 U. S. 567.

In this Evans case the appellant was a disbursing clerk of the Interior Department at $2,000 per annum and was also disbursing clerk to the architect of the Capitol at $1,000 per annum, an aggregate of $3,000 per annum. Evans sought additional compensation for disbursing a special fund. He was denied this additional compensation by virtue of Section 1765, Revised Statutes. This court did not, apparently, consider the Act of 1894 in connection with Evans' claim.

However, this court did pass upon the Act of 1894 in the case of

U. S. vs. Harsha, 172 U. S. 567,

but the precise question that is now up for consideration was not considered in the Harsha case. So far as counsel understands the decision in the Harsha case, no effort was made to lay down a rule as to the

appointments to dual offices made after the passage of the said Act of 1894.

This Act of 1894 was considered by the Court of Claims in

Pack vs. U. S., 41 C. Cls. 414.

In some respects the Pack case is similar to the one at bar. Pack was a copyist in the Navy Department, receiving $1,200 per annum and was subsequently appointed as a notary public in and for the District of Columbia. After his appointment as notary public he was appointed as civilian assistant to the Bureau of Supplies and Accounts in the Navy Department, at a salary of $2,500 per annum. It appears that Pack received the said salary of $2,500 per annum and brought suit for his fees as a notary public. The Court of Claims decided that the Act of 1894 barred his right to whatever fees he may have been entitled to by virtue of his office as notary public. In the case at bar, appellant's intestate was an assistant weigher of customs, receiving $4 per diem, or $1,460 per annum, and was subsequently appointed "clerk and acting U. S. weigher" and was paid $1,600 per annum. Here we note the difference between the two cases. Pack received the $2,500 salary but MacMath only received the $1,600 salary. If the Pack case was correctly decided then MacMath was not entitled to anything more than the $2,500 salary as U. S. weigher.

Reverting to the statute under discussion, counsel concedes that it is against the policy of the courts to hold that an Act of Congress is without force and effect. If Congress intended by this act to prevent the holding of two offices the aggregate salaries of which amounted to, or exceeded $2,500 then its intent was not manifested in the act itself. An examination of the statute would not seem to bar an employee who

is receiving a salary less than $2,500 from being appointed to a separate and additional office to which a salary of $2,500 is attached, whereas, on the other hand, it would bar an employee who is holding an office paying $2,500 per annum from being appointed to another office to which compensation is attached. Here we have an absurdity and we confess that we are unable to arrive at the real intention of the legislative body, and so leave this question in the hands of the court.

III.

An executive officer may not change the salary fixed by statute.

It is well settled that when Congress has fixed the salary of a public officer by statute, that an executive officer may not increase or decrease same.

There can be no difference of opinion on the rule above announced, for this court has conclusively settled the question.

Miller vs. U. S., 103 Fed. 413.
Glavey vs. U. S., 182 U. S. 595.
U. S. vs. Andrews, 240 U. S. 90.

The above rule was announced in the following language in the Glavey case at page 609:

> "Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment, that he will waive all salary or accept something less than the statutory sum, is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that Congress fixed the salary with due regard

> to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuse if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed, but will not come for less. And, if public policy prohibits such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel."

The language above quoted was copied from the Miller case (*supra*). If it be true that the salary of a statutory office may not be changed directly by the executive head of a department, or indirectly by compelling the signing of a waiver by the employee, can it be said with any degree of force, that such salary may be changed indirectly by adding to the enforced waiver a change of title such as that used in the case at bar, so as to effectually change the salary provisions of the statute? Obviously, MacMath was appointed to perform the duties of a U. S. weigher, but in order to avoid paying him the salary of that office, a fictitious title was substituted for the real title, and MacMath took an oath of office wherein was recited this fictitious title. We respectfully urge upon this court that the use of the fictitious title cannot have the effect relied upon by the executive department. If such intended effect is sustained by this court, it becomes manifest that any statutory salary may be changed by the executive head of a department by the simple artifice of changing the title thereto. We assume that the duties to be performed constitute the real test rather than the mere title ascribed by the executive official. MacMath, having performed all the duties prescribed by

statute and regulation for the office of U. S. weigher, and having been generally recognized and addressed as "weigher" and not as "clerk," is, in law, to be regarded as "U. S. weigher," and entitled to the salary of that office.

IV.

No theory of waiver or estoppel bars appellant's rights.

The salary of a statutory office attaches thereto as an incident of the office and no attempted waiver of that salary by the appointee can operate so as to prevent him from later asserting his right thereto.

The above proposition of law is so closely associated with the preceding one, that they might indeed be argued together. The rule in this respect was laid down by Judge Lacombe in the language quoted in the preceding point in the Miller case, and was emphasized by Mr. Justice Harlan of this court in the Glavey case (*supra*). On page 609, Mr. Justice Harlan, speaking for the court, said:

> "If it were held otherwise, the result would be that the Heads of Executive Departments could provide, in respect of all offices with fixed salaries attached, and which they could fill by appointments, that the incumbents should not have the compensation established by Congress, but should *perform the service connected with their respective positions for such compensation as the Head of a Department, under all the circumstances, deemed to be fair and adequate.* In this way the subject of salaries for public officers would be under the control of the Executive Department of the

> Government. Public policy forbids the recognition of any such power as belonging to the head of an Executive Department. The distribution of offices upon such a basis suggests evils in the administration of public affairs, which it cannot be supposed Congress intended to produce by its legislation." (Italics ours.)

See also:

U. S. vs. Andrews (supra).
Pitt vs. Board of Education, 216 N. Y. 304.

The very fact that a waiver of the salary of U. S. weigher was exacted of MacMath raises a very strong presumption that he was being appointed to that office. If such was not the case, what was the purpose of the attempted waiver? In view of the decisions of this court, we are compelled to differ with the lower court, when it attached so much importance to the said waiver and to the lack of protest by MacMath (R. 5, 6, 8).

V.

Appellant's intestate was a United States weigher.

A mere change of title of a statutory office made by an administrative official is ineffective to change the duties and perquisites of said office.

In order to ascertain the legal effect of the appointment of Thomas MacMath on May 12, 1909, as "clerk, class 3, new office, to act as acting U. S. weigher," it is necessary to look into the conditions existing at that time which brought about the making of this appointment.

Prior to the 12th day of May, 1909, the port of New York was divided into five weighing districts (R. 2) with a U. S. weigher at a compensation of $2,500 per annum in charge of each of said districts. In each district there were numerous assistant weighers and laborers, and from two to five clerks to perform the clerical work required therein. The assistant weighers were the employees who actually weighed the imported merchandise, and it seems that they made their entries of weights in a book known as a "dock book." The U. S. weighers were *supervisory* officers, and were in charge of their respective districts. Their duties were to make assignments of assistant weighers and laborers, to make returns of weights from the "dock books" submitted to them by their assistant weighers, to test the weighing implements used, and generally, to perform duties that are customarily required of supervisory officials.

At the time of the reorganization in 1909, it was deemed advisable to divide the port of New York into eight weighing districts instead of five, so as to obtain closer supervision over the work. This reorganization was effected shortly after the disclosures with reference to the perpetration of the "sugar frauds" in the said port of New York. A great many of the assistant weighers and some of the weighers were implicated in these frauds, and there was a wholesale reorganization of the weighing force, resulting in the dismissal of a great number of employees. The administrative officials, while desiring to obtain the closer supervision that the "eight district system" would afford, nevertheless attempted to accomplish this result without any great additional expenditure of money. Their purpose was commendable, we may safely admit, yet, if they exceeded their authority, we submit that no effect may be given to their laudable ambition of holding down expenses.

Four of the five weighers then in charge of the respective districts, prior to the reorganization, were dismissed and, instead of appointing eight or ten other weighers to take charge of the new districts created, the plan under discussion was evolved. This plan was to take ten of the most experienced assistant weighers who were then receiving $4.00 per diem for every day in the year and to advance them to the supervisory positions previously occupied by the dismissed weighers, and yet at a lower salary, namely, $1,600 per annum. Had they been appointed with the title "U. S. weigher," manifestly, they would have received $2,500 per annum, pursuant to the Act of July 26, 1866 *(supra)*. However, they were appointed, as heretofore stated, "clerk, class 3, to act as acting U. S. weigher," and at the same time they were required to, and did sign an attempted waiver of the salary of the office of U. S. weigher. Right here is the meat of appellant's argument. It was recognized at the time by the administrative officials that these ten assistant weighers so advanced (eight of whom were to be in active charge of the various new districts, with the other two in reserve at the Customs House) were intended, and, in fact, required to perform the identical duties theretofore performed by the five weighers. It may not be amiss at this point to repeat that these ten men, so advanced, were required to and did perform all of the duties *prescribed by statute and regulation for U. S. weigher.* It is apparent therefore, that these men were really being appointed as U. S. weighers and that the change of title was made solely for the purpose of avoiding the payment to them of the $2,500 salary fixed by statute for the office of weigher. There can be no doubt but that such was the intention for they were required to sign an alleged waiver of the salary of a weigher. Again

we ask, what was the purpose of this attempted waiver? If the administrative officials were not aware of the fact that these ten men were intended to perform the duties of weigher as prescribed by statute and regulation—if it were not so intended, the so-called waiver was worse than useless.

In the court below great emphasis was laid upon this written waiver (R. 5, 6, 8,), and upon appellant's acceptance of the salary paid him and of his failure to make or file any protest. In view of the decision of this court in

Glavey vs. U. S. (supra),

we submit most earnestly that this waiver is utterly without force or effect. Appellant's intestate lost nothing by signing same, for to give any effect to such a waiver would be to hold that an appointee and the appointing power could, by an agreement between themselves, change the salary provisions of a statute. While it is true that MacMath was probably glad to receive the increase from $1,460 per annum to $1,600 per annum, yet this fact cannot operate so as to bar him, or his administratrix, from asserting the right to the salary attached to the office to which, we contend, he was lawfully appointed.

The court below also stresses the fact that MacMath did not take the oath of office as U. S. weigher (R. 7). MacMath took the same oath of office that every other customs employee is required to take. The only difference is that in his appointment the words "clerk and acting U. S. weigher, class 3, collector's office, port and district of New York" appears. If a mere change in the title of an office, or a different designation in the oath of office can have the effect contended for by the court below, it becomes manifest that the whole question of fixing salaries for the employees in the service of the United States is within

the control of the executive heads of departments and not within the control of Congress, where this court has said that it properly lies.

Glavey vs. U. S. (supra).

It has been, is, and will be futile for Congress to prescribe the salary of any employee in the service of the United States, subject to appointment by the executive heads of the departments, if the payment of such salary can be evaded by a mere change of title or designation in the oath of office. What cannot be done by a written waiver cannot be done by an oath of office. We are strongly of the opinion that it would be contrary to public policy to give countenance to an evasion of the character of the one appearing in the case at bar. We can see no reason why the executive head of a department may not fix any salary at any rate that he may deem advisable, either *in excess of* or *below* that of the statutory salary, if approval is given to the administrative action in this case. By virtue of the provisions of the Revised Statutes 2634, as follows:

> "The Secretary of the Treasury may, from time to time, except in cases otherwise provided, limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy of any such collector, naval officer or surveyor,"

there are no restrictions placed upon the Secretary of the Treasury with regard to fixing the compensation of clerks. If the seal of approval is placed upon the administrative action in the case at bar then, and in that event, the salary of any statutory officer in the customs service may be *increased* or *decreased* at the pleasure of the appointing power by the use of an

artifice similar to the one used in the MacMath appointment. In order to illustrate what may develop should this course be adopted, we call to the court's attention R. S. 2697, in part as follows:

> "The deputy collectors at New York * * * * shall receive a salary of three thousand dollars a year each * * *."

If the Secretary of the Treasury has the power contended for in the instant case then he may appoint any employee as "clerk and acting deputy collector" at any salary *below* or *in excess* of $3,000 per annum, despite the provisions of Sec. 2697 R. S. above quoted. It is manifest that such construction would substitute the *administrative discretion* for the *legislative power*.

It will be borne in mind that MacMath's appointment read "clerk, class 3, *new office*, to act as U. S. weigher" (R. 6). (Italics ours.) Section 2621 R. S. provides

> "At such of the ports to which there are appointed a collector, naval officer and surveyor it shall be the duty of the collector. * * *
>
> Seventh: To employ, with the approval of the Secretary of the Treasury, proper persons as weighers, gaugers, measurers and inspectors at the several ports within his district."

Under this section Congress does not attempt to limit the number of weighers appointed at any port, but leaves the same to the discretion of the Secretary of the Treasury, thus giving to him the power to create as many offices of weigher as may be needed. Necessarily this power to create carries with it the power to abolish under the broad language of the section above quoted. Therefore, when the Secretary of the Treasury abolished four of the positions of U. S. weigher at the port of New York on May 12, 1909, he was acting within the scope of his authority. Like-

wise, when he created ten new offices as "clerks, class 3, to act as U. S. weigher" he was within his authority even though the designated title was unauthorized. It only remains for this court to say what was the legal effect of the appointments under consideration. We contend that the only effect of such appointments was the creation of ten new positions as U. S. weigher, and that the creation thereof was within the power of the Secretary of the Treasury. It follows, we maintain, that MacMath was, in legal effect, appointed to one of the offices of U. S. weigher thus created.

If we may be permitted to digress a moment at this point, we would call attention to the language of the court below (R. 7) wherein it is stated

> "There were five weighers and ten *or more* assistant weighers of customs at said port." (Italics ours.)

As a matter of fact, there were more than 125 assistant weighers of customs at the said port of New York at that time.

(See register of employees in Treas. Dept.)

Furthermore, the designation of these assistant weighers of customs was not changed as was stated in the opinion of the court below (R. 7). There are still employed in the said port of New York upwards of 100 assistant weighers. The only designations changed were those of the ten assistant weighers who were promoted to *supervisory* positions.

A somewhat similar attempt was made in the port of New York during the year 1877, to avoid paying to certain employees the salaries prescribed for them by statute. In that case an effort was made to pay these employees salaries in excess of the amount fixed by law.

(See 15 Op. Atty. Gen., p. 286.)

In that case the collector at the port of New York desired to pay his deputy collectors a salary of $5,000 per annum. The salaries of deputy collectors are fixed by statute at $3,000 per annum.

R. S. 2697 *(supra)*.

The New York deputies signed a waiver of the salary of deputy collector at $3,000 per annum after appointment, and were then paid $5,000 per annum as "clerks." The Attorney General, in holding that this could not be done under the law, stated at page 287:

> "Having been appointed deputy collectors, deputy naval officers or deputy surveyors, they are entitled to receive the compensation which Congress has fixed as appropriate to those positions, and they are not entitled to receive any other by affixing to them a *different or additional name.*" (Italics ours.)

We think that there can be no question but that the Attorney General correctly interpreted the law, and we submit this instance as being analogous to the case at bar.

This question arose also in the Court of Claims.

> *Adams vs. U. S. and Bradford vs. U. S.*, 20 C. Cls. 115.

In the Bradford case the court said at page 118:

> "During this period of service he was successively designated as inspector, night watchman and night inspector, but under each and all of these titles he was required to perform, and did perform the duties of an inspector."

The court gave judgment to the claimant holding that the character of the services performed was the real test as to the office he was holding, and not the title with which he was invested.

In the instant case the record shows conclusively that MacMath performed the duties that are prescribed by statute and regulation for the office of U. S. weigher and, if it should be held that he in fact did not lawfully exercise the powers affixed to that office by such statute and regulation, then it follows that all of his official acts were without force and effect. While it may be true that clerks are detailed temporarily, from time to time, to perform the duties of weighers or inspectors, yet we are not considering that situation.

MacMath was not appointed as a clerk for the purpose of performing temporarily the duties of a weigher, but on the contrary, he was appointed permanently to perform the statutory duties of weigher, and, as the record shows, he performed certain clerical duties that were necessarily incident to that office.

We conclude our argument with the following quotation from the opinion of this court in the case of

U. S. vs. Andrews, 240 U. S. 90,

at p. 96:

> "The decision in the Glavey case was expressly based on the ground that public policy forbade giving any effect whatever to an attempt to deprive by unauthorized agreement made with an official, express or implied, under the guise of a condition or otherwise, of the right to the pay given by the statute."

In this MacMath case a deliberate attempt was made by an unauthorized agreement to deprive him of the salary of the office whose duties he was expected to and did perform. It may well be that the administrative officials, having full knowledge of the decision of this court in the Glavey case *(supra)*, sought to avoid the effect thereof by adding to the

unauthorized waiver a further unauthorized designation or title.

We submit that the judgment of the Court below should be reversed.

WILLIAM E. RUSSELL,
SEWARD G. SPOOR,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attys. for Appellants.

APPENDIX.

Customs Regulations—1908 Weighers.

Art. 1478. Duties generally.—Weighers will be assigned to duty by surveyors. At ports where there is but one weigher the assistant weighers will be assigned to duty by him; he will be held responsible for the correct and efficient discharge of their duties, and will report to the surveyor any misconduct or neglect of duty on their part.

Weighers are required to be at the places to which they are assigned whenever weighable goods are being landed from vessels discharging cargo from foreign ports. They are required to inspect and take copies of all permits in the hands of the discharging inspectors of vessels whenever the collectors have, by designating articles named in the permits, directed the said articles to be weighed; and weighers are required to have and exercise a personal supervision of the weighing of such merchandise. They must not absent themselves from their office or district during hours of business unless by permission, nor will they allow any other than an assistant weigher to take weights or handle the beam.

Art. 1479. Tests of implements.—Each weigher is required to have his weighing implements tested and compared with the United States standard at least twice a year, on or as soon after the first day of January and July as possible; and to have the same tested as often as may be necessary to keep the same in conformity with the United States standard.

Art. 1480. Dock Books.—Weighers will be furnished by surveyors with proper blank dock books, in which they shall daily make a true and correct entry of goods weighed, specifying the date the weighing

was performed. These books must be so kept that they will contain all the specifications necessary to a perfect account of the merchandise weighed. The weigher should first copy the permit or order in the book, and then proceed, in all cases where the merchandise is required to be weighed by numbers, to enter the number and weight of each separate package weighed by him. The weigher must add the weights stated in each column of his book, and give the gross weight, the tare, and the net weight of each lot as returned by him, and at the end of all the entries the total gross weights, tares, and net weights must be recapitulated. The book must be indorsed on the outside with the name of the vessel, the date the return is filed in the surveyor's office, and the weigher's signature.

All dock books issued to weighers shall be serially numbered and initialed with pen and ink upon the back by the surveyor or deputy surveyor. They shall be issued in four sizes, consisting of 64, 30, 16 and 4 leaves each, respectively. The numbers shall be placed horizontally at the top of the covers on the books.

When dock books are issued by the surveyor, he shall take the receipts of the persons to whom issued, who shall be held responsible to the surveyor for their safe return. A similar receipt shall be given by each individual into whose custody a dock book passes, which receipt shall be cancelled upon the return of the book. A complete record, showing to whom the books have been issued, shall be kept in the office of the surveyor. For measuring, weighers' books shall be used.

Whenever required by the collector or the naval officer for purposes of liquidation the dock book shall be delivered to them for inspection and verification.

Art. 1481. Return of weights.—In order to facilitate the prompt liquidation of duties, weighers are required to make a special return of the weight of the articles embraced in each permit or order, as soon as the same shall have been ascertained. Weighers will file their completed books of weights, within three days after the vessel has been discharged, in the surveyor's office, as public records. A separate book will be kept for the cargo of each vessel.

Art. 1482. Poise, cleaning and testing of beam.—Marking of weight.—Before weighing any merchandise the weigher must see that the beam is accurately balanced. As correctness of weights depends very much upon the accuracy of the poise, the beam should always be kept clean and be frequently tested with the standard. A fairly even beam indicates the weight, but, as in weighing merchandise, it seldom happens that the beam will stand at an exact poise, but will go either above or below an even beam, the weight will be taken on the rising beam. Weighers are required to mark the weight on each single package weighed.

Art. 1483. Increase of weight by moisture.—Weighers are not authorized to make any allowance for an increase of weight or quantity caused by articles having absorbed moisture on the voyage of importation, and the actual weight, as ascertained after landing, will be returned. In cases of accidental and unusual leakage and shipment of water, the facts will be fully stated by the weigher in his return.

Whenever any package of merchandise is apparently increased in weight by the accidental and unusual leakage or shipment of water on the voyage of importation, the weigher will ascertain the weight of such merchandise in the condition in which it is landed; but in making his return he will report all the facts and circumstances of the case to the surveyor.

Art. 1484. Amendment of returns.—When a return has been once made by a weigher, it must not be amended or changed, except by permission of the surveyor. The amended return must state why the amendment is made and be checked or signed by the weigher before it is presented to the surveyor for his approval. The original figures will be cancelled by cross marks and the amendment added, so as to show both records. When an amendment to a return is allowed, the weigher must correct his dock book in accordance with the amended return.

Art. 1485. Weighing by mark.—All articles required to be weighed separately, under warehouse permits and general orders, shall be weighed and returned by marks and numbers; and in case there are no numbers on such casks or packages when landed, it shall be the duty of the weigher to number the same, either at or before the time determining the quantity, and to make return by such numbers. These numbers must be put on with proper marking liquid, and not with chalk, and designated in the return as "weigher's numbers."

Should a part of the figures upon packages required to be weighed and returned by number be defaced, others will be used in such manner as to avoid duplication. In such cases higher numbers should be used than those specified in the permit, and be returned as weigher's numbers.

All articles weighed, if of such size or kind as to be weighed separately, must have the letters U. S. W., with the initial of the weigher's name underneath, and the weight marked on the same, as already directed. When packages of the same mark vary materially in size and weight, they must be weighed and returned separately by their numbers, and if not numbered numbers must be placed thereon by the weighers.

Art 1486. Weighing of sugar and tobacco in certain packages.—Dutiable sugar in hogsheads, tierces, barrels or boxes need not be numbered in the absence of original numbers, but if found numbered and permitted by numbers, must be so weighed and returned. The weight must be marked in a distinct and durable manner upon the end of each cask or box with a scoring iron. Tobacco in bales, cases, or ceroons must be weighed separately and returned by numbers, and the weight distinctly marked thereon.

Art. 1487. Coal and salt.—Coal and salt will be landed under the supervision of discharging inspectors. If the inspector can not personally take account of the coal or salt delivered, the weigher is required to designate a competent man to keep the tally, under the supervision of the inspector. At least one tub in every fifty must be accurately weighed, and when weighed care must be taken to have it filled as nearly even full as possible. The inspector will see that uniformity is preserved in delivering the coal or salt. Importations of coal, railroad iron, scrap iron, and other bulky merchandise may be weighed upon either platform or railroad scales, upon application of the importer, when the expense of the weighing shall not be increased. In such cases the weighing shall be done on scales carefully tested, at each weighing, with the United States standard weights.

As soon as all the merchandise is landed, the weigher will procure from the inspector a statement of the number of the sacks, bags, or tubs delivered, and, having satisfied himself that the number so returned by the inspector is correct, will make up his return according to the average ascertained by his weights. The return of coal must show the net weight reduced to tons, hundredweights, quarters and pounds. The return of salt in bulk must state the net weight in

pounds. If in bags or other packages, the gross, tare, and net weight in pounds must be returned.

Art. 1488. Imported railroad iron and steel rails.—From every invoice of railroad iron or steel rails, a sufficient number of bars, of equal length, will be weighed in order to ascertain the average weight thereof. The whole number of bars shall be counted, and return of the weight of such rails must be made, as of other weighable merchandise. If the weigher has reason to believe that the test weight thus ascertained does not correctly represent the weight of the merchandise, he will weigh the whole importation (see Art. 1036).

Art. 1489. Exported rails.—Whenever the entire quantity of iron or steel rails embraced in an invoice is withdrawn for exportation, no weighing need be had, but in case of the withdrawal of less than the entire quantity, the whole amount so withdrawn will be weighed.

Art. 1490. Weight per bushel of grain, vegetables, coal, etc.—For the purpose of estimating the duties on importations of grain, the number of bushels shall be ascertained by weight, and 60 pounds of wheat, 60 pounds of potatoes, 50 pounds of castor beans or seed, 56 pounds of flax, poppy, or other oil seeds, 48 pounds of corn meal, 34 pounds of barley malt, 80 pounds of coal and coal slack or culm, 56 pounds of corn, 56 pounds of rye, 48 pounds of barley, 32 pounds of oats, 60 pounds of peas, and 48 pounds of buckwheat, avoirdupois weight, shall, respectively, be estimated as a bushel.

Art. 1491. Returns of weight.—Whenever a permit or order directs that goods be weighed and a special return be made therefor, the weigher will weigh the goods designated and make a return separate and dis-

tinct from any other without delay. If the merchandise has been shipped before the order to weigh is received by the weigher, he will indorse such fact on the back of the order and return it to the surveyor. Returns of the weighing of a cargo must be made to the collector and naval officer, within three days after the vessel has been discharged. Certificates or copies of weights will be furnished by the surveyor at ports where there is such an officer; elsewhere, by the collector.

Art. 1492. Expense of weighing, etc., when borne by importer.—In all cases where the invoice or entry shall not contain the weight, quantity, or measure of goods required to be weighed, gauged or measured, in order to ascertain the duties thereon, or where any good reason shall exist for the belief that the quantity was designedly misstated in the invoice with the intention of evading the proper amount of duty, then in all such cases the expense of weighing, gauging, and measuring must be defraved by the owner, agent or consignee.

Art. 1493. Articles to be weighed, etc., at expense of importer.—When imports are to be weighed, gauged or measured at the expense of the importer, the particular article on the permit to land will be doubly underscored. In all such cases the officer will state in his return the actual expense incurred in ascertaining such weight or quantity, including the compensation of the weigher, gauger or measurer for the time employed.

Art. 1494. Time of temporary assistant weighers and laborers.—Weighers will keep an exact account of the time temporary assistant weighers and laborers are employed, and make a weekly pay roll, in duplicate, of such service.

Supreme Court of the United States

No. [redacted]79

JENNIE McCARTY MACMATH, Administratrix of the goods, chattels and credits which were of THOMAS MACMATH, deceased, *Appellant*,

vs.

THE UNITED STATES.

Reply Brief for the Appellant.

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1918

Supreme Court of the United States

JENNIE MCCARTY MACMATH, Administratrix of the goods, chattels and credits which were of Thomas MacMath, deceased, Appellant, v. THE UNITED STATES.	No. 332.

APPEAL FROM THE COURT OF CLAIMS.

Reply Brief for the Appellant.

I.

Appellant, for her reply brief herein, desires to discuss briefly the cases cited by appellee in support of the position that an estoppel arose against appellant's intestate because he "accepted the payments without protest or objection" (p. 3). Apparently the appellee is approaching the issues in this case on the theory that contract questions are under consideration. If appellant's right to recover depended upon contract, we might concede that an estoppel arose when appellant's intestate signed monthly pay receipts purporting to be in full of all compensation due at the time

of the signing thereof. However, this case is brought upon a different theory as appellant's right to recover rests not upon contract but upon a statute. It has been settled beyond all peradventure that a public officer receives his salary not by virtue of a contract but because of the statute creating the office, or providing for the salary.

U. S. vs. Hartwell, 6 Wall. 385.
Fitzsimmons vs. Brooklyn, 102 N. Y. 536.
Glavey vs. U. S., 182 U. S. 595.
U. S. vs. Andrews, 240 U. S. 90.

MacMath was a public officer and so his right to the salary claimed rests upon the statute.

The Courts have very wisely, we think, consistently held that no contract arises when a citizen accepts an office created by or under the laws of the United States. In the Hartwell case (*supra*) the Court said at page 393: "A Government office is different from a Government contract." There can be no room for doubt but that the true rule is "that the salary of a public office attaches thereto as an incident thereof" (*Fitzsimmons vs. Brooklyn, supra*), and the Glavey case (pp. 606-608). Were it to be held that a public officer holds office by virtue of contract, changes in his status, whether by demotion, promotion, suspension or removal, would cause litigation in the courts, and such a tremendous amount of it would arise that the Public Service would inevitably suffer thereby. For this reason, among others, the rule has been developed that the right to hold public office and receive the emoluments thereof depends upon the statute creating or providing for the position. This rule is in accord with sound public policy (*Glavey's case*, pp. 609, 610; *Andrews' case*, 240 U. S. p. 96).

II.

It may be well at this point to consider the cases cited by appellee on page 3. The case of *Garlinger vs. United States*, 169 U. S. 316, arose out of the claim by the plaintiff, who was a night inspector in the customs service, Baltimore, Maryland, that he was entitled to two days' pay when he was compelled to work an extra watch. It seems that Garlinger received $3 a day, pursuant to R. S. 2733, and that he was supposed to work only one watch during a given period of 24 hours. It seems further that there was a Treasury regulation providing that when night inspectors worked two watches that they were not to be required to go on watch the following night. Garlinger, for a number of years, worked two watches during one night and failed to receive the extra night off in accordance with the Treasury regulation. He then brought suit for an extra day's pay for each extra watch worked by him. This Court, in deciding against Garlinger, held that the Secretary of the Treasury could not divide a day of 24 hours into more than one watch, so as to permit the payment of two days' salary or wages for such services under R. S. 2733. This case really turned upon the point just mentioned. It is true that this Court, speaking through Mr. Justice Shiras, also held that Garlinger, having accepted payments in full and without protest, had thereby estopped himself from later asserting his right to additional compensation. The cases of *Glavey vs. U. S.* and *U. S. vs. Andrews* (*supra*), however, effectually dispose of the contention that an estoppel may arise in such a case as the Garlinger case, or asserted to exist in the case at bar. The Garlinger case on this point has been overruled in effect by those cases.

The case of *Baker vs. Nachtreib*, 19 How. 126, cited by appellee on page 3, involved a contract ques-

tion pure and simple between an individual and an association of which he was a member. The doctrine therein laid down was the old familiar contract estoppel.

The same thing may be said of the case of *U. S. vs. Child*, 12 Wall. 232, also cited by appellee, page 3. This was a suit by a contractor who furnished war supplies to the United States, in 1861, pursuant to contract. A dispute arose as to the amount due, and during the negotiations the Child Company accepted a sum less than the amount claimed by it, and signed a receipt in full. It was properly held that the company was estopped to assert its right to the original amount claimed.

The case of *DeArnaud vs. U. S.*, 151 U. S. 483, cited by appellee on page 3, involved a claim for alleged secret service rendered to the United States during the Civil War, by DeArnaud, pursuant to an agreement made with Major-General Fremont, acting on behalf of the United States. This was an unliquidated claim and it appeared that DeArnaud accepted $2,000 in 1862 and signed a receipt "in full." It was held that he had estopped himself from claiming a further amount. Again we have a pure contract question. DeArnaud did not hold a public office but claimed an agreement or contract made with an authorized representative of the United States whereby he was to receive compensation for certain designated services. This DeArnaud case does not affect the principle involved in the case at bar.

Our statement last made also applies to the *Central Pacific Railroad vs. U. S.*, 164 U. S. 93, cited by appellee, page 3. This was a suit brought by the railroad company claiming compensation for carrying post office inspectors over its lines for a number of years, and who were not required to pay fare. The railroad

company had a contract to carry the United States mail, and it seems that the Postmaster-General notified the railroad company that post office inspectors would have to travel on its lines in the performance of their official duties, and that they should not be required to pay fares. Although receiving this notice the railroad company made no complaint and carried the inspectors for several years without making any protest. Finally the railroad company brought suit against the United States for the transportation of these post office inspectors over a period of years, and this Court held that the company was estopped by its conduct to assert a right to compensation. Here again we find only a contract proposition involved.

It will be seen from the foregoing that the cases cited by the appellee do not touch the case at bar, as appellant's right to recover compensation depends upon a statute and not upon a contract. Her intestate held an office, we maintain, and performed the duties thereof, to which the statute affixed a salary of $2,500 per annum. We again repeat that MacMath's acceptance of the salary paid him, and his failure to protest thereat, and his signing of a written waiver, could not and did not create an estoppel under the doctrine of the Glavey and Andrews cases (*supra*).

III.

It cannot be said with any convincing effect that MacMath elected to receive the salary of $1,800 per annum instead of the salary of $2,500 per annum, as urged by the appellee on page 4. As we have heretofore stated, MacMath was doubtless glad to receive the salary of $1,800 per annum, but his acceptance thereof could not create a presumption that he preferred to have $1,800 per annum rather than $2,500

per annum. In order to obtain the $1,800 salary he was compelled to sign a waiver of the $2,500 salary, and *we think it a fair inference that he signed such a waiver under the pressure of mental or moral duress.* Even though this conclusion should be incorrect, nevertheless to give effect to such waiver would invest administrative officials with the power to change any and all salaries of public officials regardless of legislation by Congress upon the subject. We take it that every Government employee would be glad to sign a waiver of the salary of a higher office if he could assure himself of an increase over his then existing pay. As this Court has aptly said in the Glavey and Andrews cases, such action would be contrary to public policy, and would place within the hands of the appointing authority and the appointees the power to change statutory salaries. *To hold that MacMath elected to receive the lower salary in preference to the higher would be to give full force and effect to the illegal waiver exacted of him.*

IV.

With reference to appellee's argument, page 5, that the Secretary of the Treasury had "implied authority" to designate the duties of his employees, we will add that he did so designate the duties of the office of U. S. Weigher (appellant's brief, pp. 30 to 36). Some of the duties of U. S. Weighers were, however, prescribed by statute (see appellant's brief, pp. 11, 12). It will thus be seen that the duties of U. S. Weigher were definitely fixed and we have heretofore shown that MacMath performed those duties.

V.

We do not think, as appellee seems to contend, that the Secretary of the Treasury had the power to take a mere clerk and *compel him to perform permanently* the duties of another office of great responsibility and which carried a much higher salary. To hold that he had such power would be to render ineffective the statutory mandate for the appointment of officers who should perform such duties regularly and receive the compensation fixed by law. The legislative intent was that the title and rank of the officer shall be commensurate with the duties, responsibilities and salary of the office, otherwise there would have been no classification in the way of official titles and salaries.

WHEREFORE, appellant submits that the judgment of the Court below should be reversed, with direction to enter judgment in her behalf against the United States for the amount due her intestate.

Respectfully submitted,

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

In the Supreme Court of the United States.

JENNIE MCCARTY MACMATH, ADMINISTRATRIX of the goods, chattels, and credits which were of Thomas MacMath, deceased, appellant,

v.

THE UNITED STATES.

No. 332.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

STATEMENT.

This is a "class" case, and the appeal is from a judgment dismissing the petition.

Appellant's intestate was appointed to and held the following positions in the Customs Service of the United States at the port of New York. (Finding II, Rec., 5):

"Assistant weigher of customs," August 1, 1896, at a salary of $3 per diem "when employed";

"Assistant weigher of customs," July 27, 1901, salary of $4 per diem "when employed";

July 1, 1908, "assistant weigher of customs" at $4 per diem "throughout the year";

May 12, 1909, "clerk, class 3, new office, to act as acting U. S. weigher," with compensation at the rate of $1,600 per annum.

The last position was created when the collector of the port, under authority of the Secretary of the Treasury, abolished four of the five positions of United States weighers at a salary of $2,500 per annum, and 10 assistant weighers with a compensation of $4 per diem were made "clerks of class 3, to act as acting United States weigher of customs," at a salary of $1,600 per annum each. Appellant's intestate was one of the assistant weighers so advanced. He took the oath of office and signed an agreement waiving compensation as acting weigher and limiting himself to compensation under class 3. On August 18, 1911, he was appointed as clerk, class 4, "to act as acting United States weigher of customs" at a compensation of $1,800 per annum, took the oath of office, and signed a similar waiver. He was carried on the pay rolls as clerk. (Finding II, Rec. 5.)

Appellant sues to recover the salary of weigher at $2,500 per annum from May 12, 1909, until the intestate's death October, 1913, upon the theory that intestate was appointed to the office of weigher and performed the duties in line with those of a weigher. Further, appellant contends that, in the event the court decides intestate could not receive salary from the two offices, he was entitled to the difference between the compensation received and the salary for the office of weigher for the period claimed.

The Government maintains that appellant's claim is foreclosed in the absence of fraud or circumstances constituting duress; that her intestate, having re-

ceived payments of salary during a considerable period of time without objection or protest estopped himself from making any further claim; that under the statute her intestate could not be appointed to or hold the position of "clerk" and "weigher" simultaneously and he was limited to the position of clerk to which he was appointed.

ARGUMENT.

APPELLANT'S INTESTATE ESTOPPED HIMSELF FROM ANY CLAIM BY ELECTING TO RECEIVE THE COMPENSATION WITHOUT PROTEST.

During the period of time for which the claim is made herein the intestate (Finding III, Rec. 5) made no claim for any additional compensation over and above the salary of $1,600 and $1,800, respectively, and "accepted the payments without protest or objection."

Intestate died October 8, 1913. No claim was made until February 3, 1915. (Rec. 3.)

Under the doctrine laid down in the *Garlinger case* "It may be fairly presumed that the collector, in paying, and the claimant, in accepting, the money paid, supposed that the payments were in full." The effect of this presumption is to estop appellant from asserting any claim at this time since there was no fraud or coercion practiced upon intestate. *Garlinger* v. *United States*, 169 U. S. 316, 322; *Baker* v. *Nachtrieb*, 19 How. 126; *United States* v. *Child*, 12 Wall. 232; *De Arnaud* v. *United States*, 151 U. S. 483; *Central Pacific Railroad Company* v. *United States*, 164 U. S. 93.

APPELLANT'S INTESTATE WAS LIMITED BY STATUTE TO THE SALARY OF ONE OFFICE, AND THAT THE OFFICE OF "CLERK."

Appellant claims that her intestate was appointed to the office of "clerk" and "weigher" and held these positions simultaneously and, therefore, in addition to the salary which he received as "clerk" from May 12, 1909, to October, 1913, that he should also recover for the salary of "weigher" at $2,500 per annum for the period of time stated. The position is untenable under the act approved July 31, 1894 (28 Stat. 205), wherein it is provided that "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law." The intestate could not have held the position of weigher and at the same time that of clerk under the foregoing law. Aside from the limitation of his appointment, he elected by the acceptance of his salary to eliminate himself from the $2,500 position. He also took the oath of office for the $1,800 position and signed the following agreement (Finding II, Rec. 5):

> I hereby covenant and agree to and with the United States that I shall not make claim to any compensation as acting weigher, but that my compensation as clerk, class 3, shall be the limit of any claim that I may have for services rendered while in the employ of the United States under my present appointment.

Hence the intestate was not only bound by the statute but precluded by his actions. See *Pack's case*, 41 C. Cls. 414; *United States* v. *Harsha*, 172 U. S., 567, 572.

It is of no avail for appellant to urge that because her intestate performed services such as come within the duties of "weigher" he was entitled to the salary of that class. Section 2364 of the Revised Statutes authorizes the Secretary of the Treasury to create the position of clerk such as the intestate was appointed to and to limit and fix, except in cases otherwise provided, the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor. Since the Secretary had power to appoint, he also must have had the power, in the absence of any express prohibition, to discharge, and these two powers carried with them the implied authority to designate the duties of the one appointed.

In conclusion, appellant's intestate, having been appointed to the position of clerk, having taken the oath of office and performed the duties thereunder and by express waiver and failure to protest against the salary received evidenced full knowledge of the position to which he was appointed, precluded himself from any further claim upon the Government. All this in addition to the fact that his case is foreclosed by the prohibition of the statute against holding two offices.

Respectfully submitted.

HUSTON THOMPSON,
Assistant Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

JENNIE MCCARTY MACMATH, Administratrix of the Goods, Chattels and Credits which were of Thomas MacMath, deceased,

Appellant,

vs.

THE UNITED STATES.

No. 799

Appeal from the Court of Claims.

APPELLANT'S MOTION FOR REMANDING OF RECORD.

Brief in Support of Motion.

L. T. MICHENER,
WILLIAM E. RUSSELL,
Attorney for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

JENNIE MCCARTY MACMATH, Administratrix of the Goods, Chattels and Credits which were of Thomas MacMath, deceased, Appellant, vs. THE UNITED STATES.	No. 799.

Appeal from the Court of Claims.

APPELLANT'S MOTION FOR REMANDING OF RECORD.

Brief in Support of Motion.

Now comes the appellant and moves the Court that the record in this case be remanded to the Court of Claims with instructions to that Court to find and certify the facts bearing upon the following points:

1. Whether Thomas MacMath performed all the duties attached by law and regulation to the office of United States Weigher during the entire period covered by this action.

2. Whether, although acting United States Weighers were carried on the pay rolls as clerks from May 12, 1909, they were spoken of and generally recognized as acting United States Weighers.

Appellant shows to the Court that as a matter of fact Thomas MacMath performed the duties attached by law and regulation to the office of United States Weigher during the period covered by this action, and that, although acting United States Weighers were carried on the pay rolls as clerks from May 12, 1909, they were spoken of and generally recognized as acting United States Weighers.

Appellant further shows to the Court that there was no contradictory or conflicting evidence in the Court of Claims on those points or on any other points involved in the case.

Appellant further shows to the Court in support of this motion that in the Report filed in the case in the Court of Claims by the Treasury Department, there was included a report dated January 14, 1916, from Thomas E. Rush, Surveyor of Customs for the Port of New York, to Dudley Field Malone, Collector of the Port of New York, in which, among other things, it is reported and said:

> "With reference to question No. 2, I have to say that a reorganization of the fourth division, which was the weighing division, was had on or about May 12, 1909. On May 11, 1909, the services of four U. S. weighers—O'Brien, Wardell, Drew, and Edmonstone—were discontinued and their places abolished. On May 12, 1909, the port was divided into eight weighing districts. Ten assistant

weighers were transferred and promoted to the position of clerk, class 3, at a compensation of $1,600 per annum, and invested with the designation of acting U. S. weigher. Eight of these acting U. S. weighers were assigned to districts, one in charge of each of the eight weighing districts.

Under the old system, which was abolished on May 11, 1909, each U. S. weigher had personally designated an assistant weigher to act as his representative or foreman on the district. This foreman attended to the work of assigning the laborers to duty on the piers, and assisted the U. S. weigher in supervising the work of the assistant weighers. Under the new system inaugurated May 12, 1909, the acting U. S. weighers took over all the duties previously performed by the U. S. weighers and these so-called foremen.

The two acting U. S. weighers who were not assigned to districts were detailed to the office of the deputy surveyor in charge of the weighing division for the purpose of investigation returns referred back by the liquidating division of the collector's office or naval office, complaints from importers relative to the weights of their consignments, protests made by importers or consignees against the returns on their entries, etc. These two acting U. S. weighers, because of the volume of the work, invoked the aid of assistant weighers from time to time to assist them.

On August 18, 1911, the salary of these acting U. S. weighers was increased from $1,600 to $1,800 per annum.

It had been the custom to transfer the U. S. weighers from one district to another at different times. The stated period when this should have been done was every six months, but this was not at all times adhered to. The acting U. S. weighers were transferred every six months from district to district. Under the reorganization of May 12, 1909, there was left but one U. S. weigher, and he remained in the office of the deputy surveyer of the division, his chief duty being signing weighers' returns which were made out by clerks after verification of the dock books. During his absence at any time, either on leave or on account of sickness, the returns were signed by one of the acting U. S. weighers assigned to the investigation of referred returns.

Although the acting U. S. weighers are carried on the pay rolls as clerks, they are spoken of generally and recognized and addressed as acting U. S. weighers, and the duties they perform are those prescribed by statute and regulation for U. S. weigher.

On July 24, 1914, the cargo system at this port was reorganized, the weighing division as a separate unit was abolished, and the supervision of weighing assigned to the second division known as the 'cargo division.' The port is divided into ten cargo districts, each district being in charge of an acting deputy surveyor. Owing to deaths and unfilled vacancies there are now but eight acting U. S. weighers. One of these remains assigned to the investigation of referred returns. The remaining seven are assigned to these districts. As there are more

districts than acting U. S. weighers, some of them cover either a whole or portion of an additional district. One assistant weigher has been performing the duties of acting U. S. weigher since August 6, 1913.

The acting U. S. weighers have been authorized to take acknowledgments on pay rolls of the employees on the districts simply because they were clerks. Only clerks were so authorized and they were the only clerks on the districts."

Appellant further shows to the Court that June 26, 1916, after the Court of Claims had filed its Findings of Fact, this appellant moved that Court to amend its Findings of Fact so as to include the following:

(e) Claimant's intestate performed the duties attached by law and regulation to the office of U. S. weigher during all the time covered by this action. Although acting U. S. weighers were carried on the pay rolls as clerks they were spoken of and generally recognized and addressed as acting U. S. weighers.

The motion to amend the Findings of Fact was overruled by the Court of Claims October 16, 1916 (R., 9).

JENNIE McCARTY MacMATH.

L. T. MICHENER,
Attorney for Appellant.

State of New York,
County of New York, } ss.:

Personally appeared before me, a Notary Public, in and for the County of New York, Jennie McCarty MacMath, who being sworn according to law, deposes and says that she is the appellant in the above entitled case; that she has read the foregoing motion and understands its contents, and that the matters and things therein stated are true in substance and in fact as she is informed and verily believes.

JENNIE McCARTY MACMATH.

Subscribed and sworn to before me this 6th day of April, A. D. 1917.

E. E. LEVINE,
Notary Public.

Notary Public Kings Co. cert. filed in N. Y. Co. County Clerk's Nos. Kings Co. 77; N. Y. Co. 230. Register's Nos. Kings Co. 8081; N. Y. Co. 8200. Commission expires March 30, 1918.

APPELLANT'S BRIEF ON MOTION TO REMAND RECORD.

Nature of Action.

This action is to recover the salary claimed to have been earned by Thomas MacMath, as United States Weigher in the Customs Service at the Port of New York, from May 12, 1909, to the date of his death on October 8th, 1913. The theory of the

case is that decedent held two offices not incompatible in interest and was entitled to the salary of both offices, namely, the office of Clerk and the office of United States Weigher (R., 1-3, 5-8). Decedent was appointed to the offices of Clerk and acting United States Weigher of Customs May 12, 1909, but was only paid the salary of a Clerk, although he duly performed the duties incident to each office (R., 3, 5).

When decedent received the appointment, he took and subscribed to an oath of office wherein it was recited that he had been appointed Clerk and acting United States Weigher, and in which he covenanted and agreed to and with the United States that he would not make claim to any compensation as acting Weigher, but that his compensation as clerk should be the limit of any claim that he might have for services rendered under that appointment (R., 5).

The Argument.

1. We submit that the law of the case is settled by *Glavey* vs. *United States*, 182 U. S., 595, both as to decedent's rights in holding two offices not incompatible in interest and as to the agreement set forth in the oath of office. That case holds such an agreement to be null and void (as does United States vs. Andrews, 240 U. S., 90), and that the occupant of the two offices not incompatible in interest is entitled to the salary of both offices. Other cases holding that the occupant of two such offices is entitled to the compensation of both are *United States* vs. *McCandless*, 147 U. S., 692, and *United States* vs. *Saunders*, 120 U. S., 126.

2. The foregoing is but prefatory to a discussion of the grounds set forth in the motion. Whether or not Thomas MacMath performed the duties attached by law and regulation to the office of United States Weigher during the period covered by this action should be found and certified one way or another. We submit that it is essential that this Court know what official duties the decedent performed. In Finding 11 (R., 5) it is stated that he was employed as Clerk to act as Acting United States Weigher, and in the oath of office he agreed not to make claim to any compensation as Acting Weigher. Now, there is no such office as Acting United States Weigher, but the appointment and the oath of office make it plain that he was to act as Clerk and also as Acting Weigher. However, there is such an office as United States Weigher, Act of July 26, 1866 (14 Stat., 289), and appellant's contention is that MacMath held such office and that his appointment as *Acting* United States Weigher was made for the sole purpose of avoiding the salary provision of said act. In the concluding paragraph of Finding 11 (R., 5) it is stated that "he entered upon the discharge of his office." It therefore becomes pertinent to ask which office, and what duties did he perform? That question can only be answered from the record by having the Court of Claims certify the facts with reference to the first question.

Again, near the end of Finding 11 (R., 5) it is stated that "when Acting Weigher he performed duties heretofore performed by a Weigher," but we ask were such duties those that are attached to the office of Weigher by law and regulations? We submit that it is one thing to say that he performed

duties heretofore performed by a Weigher and quite another thing to say that he performed the duties attached by law and regulation to that office.

Furthermore, that part of the finding last quoted would seem to imply that MacMath did not continuously perform the duties of a Weigher, but only at such times or during such intervals of time as he may have been designated for that purpose. As a matter of fact, the record shows in the report of Thomas E. Rush, Surveyor of Customs, heretofore set forth, that MacMath was continuously engaged in the performance of the duties of United States Weigher, and that the clerical services rendered by him were such as would attach incidentally to the performance of the duties of such office.

We therefore submit that the Findings are not in accord with the record on this point, and that it is imperative in the interest of justice, to have this doubt resolved so that this Court may determine for itself whether or not an effort has been made by an administrative officer to change the provisions of the statute by adopting a manifest subterfuge, that is to say, by a mere change in the title of the office without any change in the duties that are prescribed by statute.

3. The second ground of the motion is designed to cause this Court to be informed whether or not Acting Weighers, although carried on the payrolls as clerks from May 12, 1909, were spoken of and generally recognized as Acting United States Weighers. If the law and the regulations recognized the title of Acting Weigher and prescribed the duties of such an office, it would be unnecessary to show that decedent was recognized generally and addressed as Acting Weigher. But there is no such

regulation or law. Hence we submit that it is material that it should be made to appear clearly that while decedent was carried on the roll as Clerk and was appointed as such, yet he was spoken of and generally recognized and addressed as an Acting United States Weigher. No doubt it is true that clerks are frequently detailed as Acting Inspectors, Acting Gaugers, Acting Weighers and so on, and serve in those positions temporarily and during emergencies, not receiving any salary except the salary of a clerk, but this action proceeds upon a different ground, for the appointment of decedent was of Clerk and Acting Weigher (R., 5), and was a permanent appointment. It is clear that he was expected to perform the duties regularly and continuously of United States Weigher, and so the oath of office contained the agreement heretofore mentioned on the subject of compensation (R., 5). Therefore, we submit that it is important to this Court that the two questions should be answered by the Court of Claims.

The quotation from the department report set forth in the motion contains this language: "Although the acting U. S. Weighers are carried on the pay rolls as clerks, they are spoken of generally and recognized and addressed as acting U. S. Weighers, and the duties they perform are those prescribed by statute and regulation for U. S. Weigher."

That quotation covers both the questions set forth in the motion. There is no evidence in the record to the contrary.

4. We conclude with a paraphrase of the language of this Court in *Ripley* vs. *United States,*

220 U. S., 491, that the Findings are so incomplete and inconclusive as to render it impossible to decide the cause without grave risk of doing wrong to the plaintiff or serious injustice to the Government, but that which is incomplete and inconclusive in the present record can be made complete and conclusive as to the facts by remanding the record to the court below with instructions to find and certify as requested by the motion.

L. T. MICHENER,
WILLIAM E. RUSSELL,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

JENNIE MCCARTY MACMATH, administratrix of the goods, chattels, and credits which were of Thomas MacMath, deceased, appellant,

v.

THE UNITED STATES.

No. 799.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE IN OPPOSITION TO APPELLANT'S MOTION FOR REMANDING OF RECORD.

Appellant moves the court that the record in this case be remanded to the Court of Claims with instructions to that court to find and certify the facts bearing upon the following points:

1. Whether Thomas MacMath performed all the duties attached by law and regulation to the office of United States weigher during the entire period covered by this action.

2. Whether, although acting United States weighers were carried on the pay rolls as clerks from May 12, 1909, they were spoken of and generally recognized as acting United States weighers.

Appellee submits that the motion should be disallowed for the reason that every fact material to the final disposition of this case has been considered and found by the Court of Claims, and its action fully disclosed by the record as it now stands.

STATEMENT.

This suit was brought in the Court of Claims for the recovery of $11,013.89, for services as acting weigher of customs, at $2,500 a year, from May 12, 1909, to October 8, 1913, upon the ground that the duties performed by the appellant, under his appointment as clerk and acting weigher of customs, were those of two distinct offices not incompatible in interest, and that he was entitled to receive the salaries of both.

Appellant's decedent, Thomas MacMath, was employed in the New York customhouse from 1896 to the time of his death, in 1913. Part of the time he was assistant weigher, receiving daily wages, or a yearly salary at a fixed per diem.

The collector of customs of the port of New York in 1909 reorganized his force by reducing the number of weighers of customs from five to one, and by appointing ten of the assistant weighers as clerks, class 3, and acting weighers of customs at salaries of $1,600 per annum each.

Thomas MacMath, one of the assistant weighers, was, on May 12, 1909, appointed as "clerk, class 3, new office, to act as acting U. S. weigher." On August 18, 1911, he was appointed as "clerk,

class 4, to act as acting United States weigher of customs, at a compensation of $1,800 per annum." He took the prescribed oath of office after receiving each of the two appointments, and received the compensation of the last until his death on October 8, 1913, without protest or objection.

After his death his widow filed the aforesaid claim with the Auditor of the Treasury, by whom it was disallowed, and the action of the auditor affirmed by the Comptroller of the Treasury, whereupon the appellant brought this action for the additional salary as claimed.

ARGUMENT.

An inspection of the findings of fact made by the Court of Claims will show that every material fact requested by appellant was considered and acted upon by the court.

In the first paragraph of her motion, appellant requests this court to instruct the Court of Claims to find whether Thomas MacMath performed all of the duties of United States weigher during the period covered by this action. The Court of Claims found that Thomas MacMath performed these duties when it said (Finding II, p. 2): "He was carried on the pay rolls as clerk. When acting weigher he performed duties theretofore performed by a weigher."

In the second paragraph of her motion, appellant requests this court to instruct the Court of Claims to find whether or not, although acting weighers were carried on the pay rolls as clerks from May 12, 1909,

"they were spoken of and generally recognized as acting United States weighers."

The Court of Claims has found that Thomas MacMath was appointed as clerk, class 3, and afterwards as clerk, class 4, and acting United States weigher, and that he performed the duties of weigher of customs under the two appointments. How or by whom he was recognized "as acting United States weigher" would appear to be mere surplusage.

Appellees submit that all of the facts material to the final disposition of this case are contained in the findings of the Court of Claims, numbered II and III, which are part of the record here, and are as follows:

II.

> Claimant's intestate, the said Thomas MacMath, held the following positions in the customs service of the United States at the port of New York: He was appointed "assistant weigher of customs" August 1, 1896, at a salary of $3 per diem "when employed"; he was appointed "assistant weigher of customs" July 27, 1901, at a salary of $4 per diem "when employed." On July 1, 1908, his designation as "assistant weigher of customs" at $4 per diem "when employed" was changed so that his compensation was fixed at $4 per diem throughout the year. On May 12, 1909, he was appointed as "clerk, class 3, new office, to act as acting U. S. weigher," with compensation at the rate of $1,600 per annum. This last appointment resulted from a reorganization recommended by the collector of the port

and approved by the Secretary of the Treasury, whereby 4 of the 5 positions of United States weigher at a compensation of $2,500 per annum each were abolished and 10 assistant weighers at a compensation of $4 per diem each were made "clerks of class 3, to act as acting United States weigher of customs," at a compensation of $1,600 per annum each. The said Thomas MacMath was one of the assistant weighers so advanced. When he received the last-named appointment the said Thomas MacMath took and subscribed to the oath of office, wherein it was recited that he had been "appointed clerk and acting U. S. weigher, class 3, collector's office, port and district of New York"; and upon or attached to the form containing the oath subscribed to was the following agreement, duly signed by the said MacMath:

"I hereby covenant and agree to and with the United States that I shall not make claim to any compensation as acting weigher, but that my compensation as clerk, class 3, shall be the limit of any claim that I may have for services rendered while in the employ of the United States under my present appointment."

He entered upon the discharge of his office, and on August 18, 1911, he was again appointed as clerk, class 4, to act as acting United States weigher of customs, at a compensation of $1,800 per annum. He took and subscribed to the same oath of office and signed an agreement in all things similar to the one above quoted. He was carried on the pay rolls as clerk. When acting weigher he performed

duties theretofore performed by a weigher. Acting United States weighers were also authorized to take acknowledgments of employees on pay rolls, a duty which devolved upon clerks alone.

III.

The said Thomas MacMath continued in the said service until the date of his death, and during the entire period of his employment he was paid the said compensation fixed by the collector. At no time did he ever claim any additional compensation than that fixed as stated above, and he accepted the payments without protest or objection.

It is apparent from the foregoing statement that all of the material facts requested by appellant to be certified by the Court of Claims are a part of the record.

JOHN W. DAVIS,
Solicitor General.
HUSTON THOMPSON,
Assistant Attorney General.

MAY, 1917.

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MacMATH, ADMINISTRATRIX OF MacMATH, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 79. Argued November 22, 1918.—Decided December 9, 1918.

Revised Statutes, § 2621, authorizes Collectors to employ, with the approval of the Secretary of the Treasury, weighers at the several ports, and does not prescribe their number; the Act of July 26, 1866, c. 269, § 3, 14 Stat. 289, fixes their salaries at $2,500; Rev. Stats., § 2634, authorizes the Secretary to fix the number and compensation of clerks to be employed by any Collector. M received successive appointments as clerk "to act as acting U. S. weigher," at compensations less than $2,500 per annum, and took oath as such. *Held*, that the fact that he was assigned, and performed, the duties of weigher did not place him in that office and entitle him to its salary. 51 Ct. Clms. 356, affirmed.

THE case is stated in the opinion.

Mr. William E. Russell, with whom *Mr. Seward G. Spoor*, *Mr. Louis T. Michener* and *Mr. Perry G. Michener* were on the briefs, for appellant.

Mr. Assistant Attorney General Thompson, for the United States, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

When an office with a fixed salary has been created by statute, and a person duly appointed to it has qualified and entered upon the discharge of his duties, he is entitled, during his incumbency, to be paid the salary prescribed by statute; and effect will not be given to any attempt to deprive him of the right thereto, whether it be by unauthorized agreement, by condition, or otherwise. *United States* v. *Andrews*, 240 U. S. 90; *Glavey* v. *United States*, 182 U. S. 595.

Section 3 of the Act of July 26, 1866, c. 269, 14 Stat. 289, provides, that weighers at the port of New York shall receive an annual salary of $2,500. Section 2621 of the Revised Statutes authorizes collectors to employ, with the approval of the Secretary of the Treasury, weighers at the several ports; and it does not prescribe their number. Section 2634 authorizes the Secretary of the Treasury to fix the number and compensation of clerks to be employed by any collector. The statutes appear to have made no specific provision for the appointment of assistant or acting United States weighers. On May 12, 1909, plaintiff's intestate (who had been appointed on August 1, 1896, "assistant weigher of customs" at a salary, "when employed," of $3 per diem and had later received a like appointment at $4 per diem) was appointed by the collector "clerk, class 3, new office, to act as acting U. S. weigher" with compensation at the rate

of $1,600 per annum. On August 18, 1911, he received a like appointment as clerk, class 4, at the rate of $1,800 per annum. He continued to perform the duties assigned and was paid the salary named until his death, October 8, 1913. In February, 1915, his administratrix filed with the Auditor of the Treasury a claim for salary of her intestate as "United States weigher of customs" at the rate of $2,500 per annum, from May 12, 1909, to and including October 7, 1913. Upon disallowance of the claim she brought this suit in the Court of Claims for the amount, namely, $11,013.89. The court found for the defendant and entered judgment dismissing the petition. The case comes here on appeal.

There is a fundamental objection to the allowance of the claim or any part thereof. MacMath was never appointed weigher and never held office as such. His only appointment was that of clerk; his oath of office being as "clerk and acting U. S. weigher, class 3." The Secretary of the Treasury clearly had the right to create and the collector to make appointment to the position of clerk and to designate duties of the appointee. The fact that the incumbent performed also some or all the duties of a weigher does not operate to promote him automatically to the statutory office of weigher. And the fact that his appointment as clerk in 1909 was made as a part of a reorganization of the service, whereby four of the five positions of United States weigher were abolished, is immaterial; except as showing even more clearly that it was the intention not to appoint him weigher. No contention is, or could successfully be, made that the weighing should be paid for as an extra service, even if it was not a duty attaching to his position as clerk. See *United States* v. *Garlinger*, 169 U. S. 316.

We have, therefore, no occasion to consider whether effect should be given to the agreement by the intestate not to make claim to compensation as acting weigher, or

to his acceptance of the lower compensation without protest during the entire term of his service; nor need we consider the effect of § 2 of the Act of July 31, 1894, c. 174, 28 Stat. 162, 205, which provides that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law."

The judgment of the Court of Claims is

Affirmed.